Supreme Court, U.S.
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No. 99-828

In The

Supreme Court of the United States

JUDDS BROTHERS CONSTRUCTION COMPANY,

Petitioner,

v.

BURLINGTON NORTHERN RAILROAD COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the constitution or any Federal Rule of Civil Procedure requires a party in a civil case to list its anticipated evidentiary objections in the pretrial order.

II. Whether the constitution or any Federal Rule of Civil Procedure requires a party in a civil case to inform the opposing party of what the opponent must prove to be successful at trial.

III. Whether the constitution or any Federal Rule of Civil Procedure prevents a trial judge from reversing erroneous provisional evidentiary rulings that formed the basis for a judgment and entering judgment as a matter of law as provided in FRCP 50(b).

IV. Whether the constitution or any Federal Rule of Civil Procedure prevents a trial judge from entering judgment based on failure to comply with the statute of frauds, when it was pled as an affirmative defense in the answer and proved at trial.

LIST OF PARTIES

At the time this case was filed, the Plaintiff was Burlington Northern Railroad Company. Subsequently, the Atchison, Topeka and Santa Fe Railway Company merged with and into Burlington Northern Railroad Company and the surviving entity changed its name to The Burlington Northern and Santa Fe Railway Company ("BNSF"). BNSF is a wholly-owned subsidiary of Burlington Northern Santa Fe Corporation.

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STATEMENT OF THE CASE

Respondent, Burlington Northern and Santa Fe Railway ("BNSF"[1]), disagrees with many of the assertions in Petitioner's Statement of the Case, and the Court will find, as the Court of Appeals found, they are not supported by the record citations in Judds Brothers' brief. William Glavin did not testify to any oral agreement that Judds Brothers would receive every contract on which it was the low bidder. Moreover, Raymond Judds admitted that Mr. Glavin did not make any such statement.

Contrary to Judds Brothers' statements in its Petition for a Writ of Certiorari, Judds was not surprised or misled by the trial court or BNSF. Judds Brothers' attorney was well aware that the issues concerning whether there were oral settlement agreements were central to the case, and the judge clearly informed both trial counsel that his overruling of BNSF's objections to evidence of oral contracts varying the parties' written agreement was only provisional. The trial judge repeatedly stated that he needed to hear Judds' evidence of the oral agreements before he could determine whether there was an enforceable oral contract, and cautioned the parties that his rulings on admissibility of the oral agreements were subject to change as the trial proceeded or after all the evidence was received. Counsel for Judds Brothers confirmed his understanding of the judge's reasoning, and

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[1] After this case was filed, Burlington Northern Railroad merged with Santa Fe Railway to become Burlington Northern and Santa Fe Railway. For simplicity, Burlington Northern Santa Fe and its predecessor will be consistently referred to herein as "BNSF."

agreed that this was the proper procedure to follow. Significantly, Judds Brothers never suggested that it was surprised that BNSF had challenged the admissibility of its evidence of an oral contract or indicated that it was not prepared to meet BNSF's objections until after judgment was entered for BNSF. Even then, Judds did not proffer any additional evidence of exceptions to the statute of frauds or parol evidence rule that it had not offered at trial. Instead, it argued on appeal that it had offered sufficient evidence of fraud, waiver or other exceptions to the parol evidence rule and the statute of frauds, as well as contending that those defenses had not been established.

A. Judds Brothers' claim.

In this case, Judds Brothers, a Nebraska contractor, alleged BNSF violated oral and written agreements to settle a construction dispute. (Answer, pp. 3-5; App. 46-47). These agreements were allegedly reached during a prior construction suit between Judds Brothers and BNSF's predecessor when William Glavin, former Chief Engineer for the railroad, and Raymond Judds, former president of Judds Brothers, met and negotiated a settlement on January 16, 1990. Glavin and Ray Judds were the only ones present and the only witnesses at trial who had any knowledge of the negotiations.[2] (Tr. 62:9-63:3; App. 155-56).

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[2] In his deposition, Mr. Glavin initially thought both parties' lawyers may have been present in preliminary discussions, but after Judds Brothers' counsel corrected his recollection, concluded that no attorneys were present. (Tr.

At the January 16, 1990 meeting, Mr. Glavin drafted a one-page letter setting forth the agreements reached. (Ex. 81; Tr. 999:23-24, 1011:14-19; App. 326, 337-38). The first paragraph of the letter, Exhibit 81, states:

> This will confirm an understanding you and I reached today ***to settle all litigation and claims*** arising out of the Gibson Yard Intermodal facility at Omaha, Nebraska including HWS and any others associated with this project.[3] ***It is agreed as follows:***
>
> [Subparagraphs A-E set forth the terms to which the parties agreed].
>
> ***If the above terms are acceptable to Judds Brothers please indicate by signing on the line below*** and returning one copy to me.

App. 134-35 (emphasis added).

At trial Ray Judds initially tried to maintain that the written agreement set forth only part of the settlement, but he had previously admitted that the letter completely set forth the terms agreed upon. (Tr. 100:17-20, 102:9-103:18; App. 194, 196-97). When he returned from his meeting with Glavin he showed the letter to his son and another company officer and told them it was the parties' settlement agreement. (Tr. 104:3-20; App. 197-98).

196:18-197:4; 988:5-989:21; App. 285-86; 315-16). Glavin consistently maintained that only he and Judds were present during the settlement negotiations but he had a brief phone call with BN counsel to obtain additional settlement authority and keep him informed on the negotiations. (Tr. 196:3-23, 197:5-13; 988:22-989:21; 1011:7-13; App. 285-86, 315-16, 337).

[3] The underlined language was inserted in Exhibit 81 by interlineation.

Subparagraph (D) of Exhibit 81 states:

> I will write you a letter indicating that the litigation here resulted from a misunderstanding between the parties and that the controversy has been resolved to the mutual satisfaction of Burlington Northern and Judds Brothers.

(App. 135). This provision was included because Judds Brothers had been having difficulty borrowing money, obtaining performance bonds and getting work because of its litigation with the railroad. Raymond Judds had therefore asked for a letter Judds Brothers could show its bonding company, banker and others. (Tr. 104:22-105:8; App. 198-99).

Raymond Judds and Glavin agreed that Exhibit 85, dated January 22, 1990, is the letter that Glavin wrote to comply with paragraph D of Exhibit 81. (Tr. 105:12-18, 999:1-22; App. 199, 325-26).

The second paragraph of Exhibit 85 states:

> Judds Brothers continues to be a supplier of construction services to the Burlington Northern Railroad. Judds has also provided tie rehabilitation service to the Burlington Northern since 1987.

App. 138. When Glavin wrote the above-quoted paragraph he was referring to the ongoing work being done by Judds Brothers and its related companies. (Tr. 1000:19-1001:3; App. 327). Judds Brothers' position at trial, however, was that the first sentence in the paragraph was intended to refer to an oral agreement requiring BNSF to let Judds Brothers bid on any and all projects it felt it was qualified to perform in the future, and to

award it any projects on which it was the low bidder. At trial and on appeal Judds Brothers advanced this theory to explain why the alleged oral contract was not barred by the parol evidence rule or the statute of frauds.

Although Raymond Judds contended there was an "implied" agreement BNSF would award his company every project on which it submitted the low bid, neither Exhibit 81 nor Exhibit 85 contains any mention of Judds Brothers receiving projects on which it is the low bidder, or says Judds Brothers will be able to bid on any BNSF project for any definite or indefinite period in the future. (App. 134-35, 138).

1. Raising the parol evidence rule and the statute of frauds.

In its reply to Judds Brothers' counterclaim BNSF admitted the written settlement agreement dated January 16, 1990, but denied that there were any oral agreements added to that written agreement. BNSF also denied there was any agreement guaranteeing Judds Brothers could bid on BNSF projects for any definite or indefinite time in the future, and denied that any agreement obligated BNSF to accept Judds Brothers' bids. (BNSF Reply to Counterclaim, pp. 1-3; App. 56-59). BNSF pled as its "SECOND DEFENSE" that the oral agreement alleged by Judds Brothers could not be performed within one year, and therefore would violate the Statute of Frauds, Neb. Rev. Stat. §36-202. (Answer p. 3; App. 58).

In the pretrial conference memorandum, BNSF listed as controverted issues:

1. Whether the Settlement Agreement of January 16, 1990, or the letter of 1-22-90 or any oral promise gives Judds a contractual right to bid on Burlington Northern Railraod [sic] construction projects.

2. Whether the Settlement Agreement of January 16, 1990 or the letter of 1-22-90 or any oral promise gives Judds Bros. a contractual right to contract with BNRR.

3. Whether BNRR has breached its Settlement Agreement of January 16, 1990.

(Pretrial Memorandum, p. 3; App. 65).

On March 26, 1998, four days before trial, BNSF filed a motion in limine objecting to the introduction of evidence adding to or contradicting the terms of the written settlement agreement of January 16, 1990. (Motion in Limine, filing no. 47; App. 26). The court took up the motion on the first day of trial and ***provisionally*** denied the motion seeking to exclude evidence *de hors* the written agreement on the basis he needed to hear evidence of the parties' intent before deciding whether extrinsic evidence was admissible. (Tr. 5:24-8:7; App. 139-42). In explaining his denial of the motion in limine at that point, Judge Strom stated:

> [I]n part the ultimate decision of this court as it relates to the issues to be submitted to the jury and to the scope of these contracts . . . requires that the Court have more evidence before it than it does right now, ***and that is not to say that at the close of the plaintiff's case I may conclude that the contract is – is unambiguous and the evidence does [p. 8] not support as it were a – finding that it's ambiguous or***

> ***does not mean what it says, but I'm going to permit the plaintiffs to go forward and put into evidence the discussions that took place . . . when Mr. Judds went down to settle the prior litigation which gave rise to the settlement agreement of January 16, 1990.***

App. 141-42.

On the second day of trial, the trial judge initiated another discussion with counsel outside of the presence of the jury, in which he again stated that his rulings on the admissibility of the evidence of oral contracts were provisional, and that he was continuing to evaluate this evidence to determine whether a jury issue would be presented. Specifically, the Judge expressed "concerns" about Judds Brothers' theory that Exhibit 81 or 85 was a memorialization of oral agreements made between Messrs. Judds and Glavin, sufficient to avoid application of the parol evidence objections in BNSF's motion in limine. Judge Strom reiterated his position that he could not finally determine applicability of the parol evidence rule until he had heard Judds Brothers' evidence concerning the oral agreements made on January 16, 1990. Counsel for Judds Brothers acknowledged that he understood the judge's rulings were provisional, and he concurred that this was the proper procedure under these circumstances.

> THE COURT:. . . . The fact is that if there is a contract here, it seems to me as I read this – and I spent some time last night looking at some cases, and I'm still not – ***nothing that I'm saying here is written in stone by any means,*** but it seems to me that a document, Exhibit 81, dated January 16, 1990 is not the contract that the

parties are really suing on. ***There's nothing ambiguous about that document. It looks to me like when you read paragraph d, it doesn't make any reference to any continuing relationship or continuing to do business.*** That agreement, if it was entered into, was an oral agreement at the time which if it was memorialized at all was memorialized in part or at least referenced in part in the letter of January 22, 1990 [Exhibit 85].

Now, that seems to me to be the posture of this case, and ***I'm not saying that's where I'm going to end up,*** but it seems to me that's the direction we were coming from, and Mr. Dittrick [counsel for Judds Brothers], let me address you first. I don't know if you agree or not, but I would appreciate your thoughts on the observations that I have made in that regard.

MR. DITTRICK: I believe Judge, that the – or, Judge at the meeting on January 16, 1990, there were a number of agreements that were made by the parties. Certainly to dismiss the lawsuit, that was agreed upon, certainly to pay Judds Brothers 250,000, that was agreed upon.

THE COURT: The subcontractor.

MR. DITTRICK: The subcontractor. I mean, certainly that was agreed upon, but ***we think as part of that meeting there was also an agreement*** –

THE COURT: Yeah, ***but it wasn't – it was not a part of the January 16 document.***

MR. DITTRICK: Well, it was and it wasn't. I mean the January 16th referred to that letter [Exhibit 85] and the reason for that letter was as Mr. Confer says, Judge, in part for bonding and for insurance to show people, but ***it was also to***

memorialize the agreement that Judds would continue to be a contractor and was going to be treated like everybody else was. I mean, that was –

THE COURT: *There's nothing in the January 16 document that says that or even infers it really as I see it. I mean, that's where I'm having the difficulty with the January – it just – it says that they'll write a letter –*

MR. DITTRICK: True.

THE COURT: – and that letter was written [Exhibit 85]. The letter in addition – the second paragraph –

MR. DITTRICK: Yes.

THE COURT: – of the letter [Exhibit 85] is the document that presents the issue that we're involved in. Now I don't – I think you could have several – well, I won't say that categorically, but, you know, you could enter into several agreements at one time and not put them all in one document. I have no problem with that.

MR. DITTRICK: Agreed.

THE COURT: It just doesn't seem to me that the January 16th document is the basis for the plaintiff's claims in this case. Now, as I say this isn't –

MR. DITTRICK: I understand.

THE COURT: *I'm just expressing some concerns that I have so that you understand maybe better some of the rulings that I'm making.*

MR. DITTRICK: And I think I understand your concerns, Judge, and I think – *I think I'm in agreement with the Court that we need to hear all the evidence. We need to hear Mr. Glavin's testimony and Mr. Judds, and we'll wrestle with this later.*

THE COURT: *Yeah, we will be, but I'm trying – I'm trying to get things a little bit into perspective, but – but as long as you're aware of what I – my concerns are, then maybe you can be addressing those as we go through this case.*

MR. DITTRICK: I understand, Judge.

Tr. 138-40; App. 227-30 (emphasis added).

During trial BNSF consistently objected to Raymond Judds' oral evidence that added to or contradicted the written agreement. Over BNSF's parol evidence objections, Mr. Judds also claimed other agreements were made at the meeting that are not in the settlement agreement, Exhibit 81, or in Glavin's January 22, 1990 letter, Exhibit 85. He said he told Glavin Judds Brothers wanted to bid on all the work it could handle, and if it was the low bidder it wanted to be awarded the jobs. (Tr. 69:5-69:19; App. 162-63). Whenever he was asked about Mr. Glavin's responses to his settlement demands, Ray Judds repeated the conclusory statement that Glavin "had no problem" with Judds' demands. (Tr. 68:6-7, 69:1-3, 69:22, 71:10, 76:20; App. 161, 162, 163, 165, 170). On cross-examination he was asked what he meant when he said Glavin "had no problem" with his demand that Judds Brothers receive any contract on which it was the low bidder. After being impeached with his deposition, Mr. Judds admitted that he believed the agreement between

him and Glavin was "implied," and that Mr. Glavin had never made any statement that led him to conclude that BNSF had agreed to award Judds Brothers every contract upon which it submitted the low bid. Tr. 107:17-109:22; App. 201-03.

2. Verdict, judgment and appeal.

BNSF moved for a directed verdict after Judds Brothers rested, and renewed the motion after BNSF's evidence, in part on the basis that there was no competent evidence of any agreement that would allow Judds Brothers to recover. These motions were denied. The jury returned a verdict in the amount of $791,232 based on the evidence of an alleged oral contract, and judgment was entered in Judds Brothers' favor for that amount.

BNSF then moved for judgment under FRCP 50(b), on the basis that there was no legally competent evidence to support the judgment in Judds Brothers' favor. (App. 121-24). The District Court agreed and entered judgment for BNSF on the basis that the parol evidence rule did not allow evidence of the oral contract that varied and contradicted the parties' written agreement. (App. 11-12). As an alternative ground for the judgment, the trial judge concluded that the oral contract asserted by Judds did not meet the requirements of the Nebraska statute of frauds. (App. 12-14).

On appeal to the Eighth Circuit, the judgment was affirmed on the basis of the district court opinion. The Court of Appeals also reviewed the record and concluded

that Judds Brothers' constitutional and other arguments lacked any merit. (App. 1-3).

SUMMARY OF ARGUMENT

BNSF was not required to plead or identify its parol evidence and statute of fraud objections in the pretrial order, according to the local rules. The parol evidence rule and the statute of frauds are substantive requirements of Nebraska contract law that Judds Brothers had to comply with to establish its claim. By controverting the issue of whether any oral or written contract contained the promises Judds Brothers alleged, BNSF placed Judds Brothers on notice that it would be required to prove a legally enforceable contract by legally competent evidence.

Judds Brothers was made aware that the judge's rulings on its evidence of oral settlement agreements were only provisional, because the court needed to hear the evidence to determine if there was an enforceable oral contract. The court cautioned the parties that he did not know how he would ultimately rule on this issue. Judds Brothers' counsel agreed that this was the correct procedure to be followed. Judds Brothers was not prevented from presenting any evidence to meet the parol evidence objections or the statute of frauds, and has never proffered any such evidence.

Judds Brothers' constitutional and procedural arguments were carefully reviewed by the Court of Appeals and found to be without merit.

ARGUMENT

1. BNSF did not waive its parol evidence objection or the statute of frauds.

Judds Brothers argues that BNSF waived its parol evidence objections and the statute of frauds by failing to include them in the pretrial conference memorandum. The local rule in the District of Nebraska requires parties to: "Set out in detail each element of the claim or defense which is genuinely controverted. . . . " NELR 16.2(a)(2)(C) (emphasis added).

BNSF complied with this rule by stating, as it had in its pleadings, that it controverted Judds Brothers' claim that there was an oral or written contract which required it to award Judds Brothers any contract on which it was the low bidder. This clearly put Judds Brothers on notice it would be required to establish the requisite elements of its claim with competent legal evidence. It was unable to do so because Raymond Judds' oral evidence added to and contradicted the terms of the parties' integrated written agreement; under the Nebraska parol evidence rule such evidence is inadmissible.

BNSF was not required to anticipate and list each objection it might make to the testimony of Judds Brothers' witnesses. BNSF's indication in the pretrial order that it was controverting Judds Brothers' claims

premised on written and oral promises was adequate notice to Judds Brothers that it would have to present legally admissible evidence to establish the alleged agreements.

Judds Brothers also appears to be relying on the rule that an affirmative defense may be waived if not pled. FRCP 8(c). Unfortunately for Judds Brothers, the parol evidence rule is not an affirmative defense that needs to be set forth specifically in a party's pleading. The parol evidence rule is a substantive rule that governed the evidence Judds Brothers could rely on to prove its contract claim. *E.g., Rayman v. American Charter Fed. Sav. & Loan Assn.*, 75 F.3d 349 (8th Cir. 1996); *Krzycki v. Genoa Nat'l Bank*, 242 Neb. 819, 496 N.W.2d 916 (1993).

Similarly, in Nebraska the statute of frauds is not an affirmative defense. *Ord v. Benson*, 163 Neb. 367, 79 N.W.2d 713 (1956); *Benes v. Reed*, 158 Neb. 128, 62 N.W.2d 320 (1954). Instead, it is a statute with which plaintiff's proof must comply in order to permit recovery. *Johnson v. NM Farms Bartlett, Inc.*, 226 Neb. 680, 414 N.W.2d 256 (1987); *Benes v. Reed, supra*. Nevertheless, the Federal Rules list the statute of frauds as an affirmative defense which must be pled, and BNSF therefore did plead the statute of frauds in its reply to Judds Brothers' counterclaim, thus putting Judds Brothers on notice that BNSF would rely on the statute of frauds. Even so, the burden was on Judds Brothers to prove an agreement that complied with the statute or prove that its claim came within an exception. *NM Farms, supra; Benes v. Reed, supra*. When BNSF raised whether any oral or written contract gave Plaintiff the right to recover as a controverted issue in the pretrial order, Judds Brothers was thereby required to

prove that it had such a contractual right enforceable under Nebraska law. Included in those requirements was the necessity of showing that the contract fulfilled the legal requirements of the statute of frauds.

BNSF's identification of issues in the pretrial memorandum allowed it to challenge Judds Brothers' claims on the basis that the legally competent evidence did not establish a valid oral or written contract. To prove its case, it then became incumbent on Judds Brothers to introduce evidence that was admissible over parol evidence or other objections, and to prove that the alleged contract complied with the statute of frauds. In granting BNSF's post-trial motion for judgment, Judge Strom obviously concluded that the parol evidence rule and the statute of frauds were properly raised by BNSF in its pleadings and in the pretrial order.

2. The trial judge clearly explained that his rulings on the evidence of oral contracts were provisional, and petitioner's counsel agreed this was the proper procedure to follow.

Judds Brothers has accused Judge Strom of misleading it by stating that BNSF had waived its right to rely on the parol evidence rule. To support this contention, it cites a comment by the trial judge questioning whether BNSF could rely on matters not in the pretrial order. (App. 231-232). Read in context, Judge Strom's statement refers to BNSF counsel's attempt to read admissions from Judds Brothers' pleadings that had been superseded by the pretrial order rather than to the parol evidence issue.

Even if the judge's comment was not intended to question whether BNSF should have identified parol evidence questions in the pretrial order at that juncture, however, he repeatedly stated that he was inviting counsel's input because his thinking was only preliminary. (Tr. 137:25-138:20; 139:15-140:21; App. 227-230).

The court's exchanges with counsel outside the jury, which we have recited above, made it quite clear that he considered his rulings on Judds Brothers' oral evidence as preliminary only, and that he was not foreclosing the possibility that he would decide after hearing the evidence that it was barred by the parol evidence rule or the statute of frauds and grant a motion for directed verdict on that basis.

Judds Brothers' counsel was not surprised by the court deciding to follow this procedure of listening to the oral testimony before determining whether it was barred by the parol evidence rule or whether the alleged contract met the requirements of the statute of frauds. In fact, Judds' counsel expressed his agreement with the way in which the judge said he was going to proceed in making his provisional rulings on the parol evidence objections and deciding whether an enforceable oral contract was proved after hearing all the evidence: "I'm in agreement with the Court that we need to hear all the evidence. We need to hear Mr. Glavin's testimony and Mr. Judds, and we'll wrestle with this later." (App. 229-30).

In *Traudt v. Nebraska Pub. Power Dist.*, 197 Neb. 765, 770-74, 251 N.W.2d 148, 151-53 (1977), the Nebraska court made it clear that the parol evidence rule contemplates that testimony will often be necessary for the trial court

to determine the extent of integration of written agreements, and the consequences that flow from integration, by quoting from Wigmore's treatise:

> He says: " . . . the inquiry is whether the writing was intended to cover a *certain subject* of negotiation; for if it was not, then the writing does not embody the transaction on that subject; and one of the circumstances of decision will be whether the one subject is so associated with the others that they are in effect 'parts' of the same transaction, and therefore, if reduced to writing at all, they must be governed by the same writing." 9 Wigmore on Evidence (3d Ed.), §2340, p. 97. He goes on to say: "What it was intended to cover cannot be known till we know what there was to cover. The question being whether certain subjects of negotiation were intended to be covered, we must compare the writing and the negotiations before we can determine whether they were in fact covered. Thus, the apparent paradox is committed of receiving proof of certain negotiations in order to determine whether to exclude them; and this doubtless has sometimes seemed to lower the rule to a quibble. But the paradox is apparent only. The explanation is that these alleged negotiations are received only provisionally. Although in form the witnesses may be allowed to recite the facts, yet in truth the facts will be afterwards treated as immaterial and legally void, if the rule is held applicable." 9 Wigmore on Evidence (3d Ed.), §2340(2), p. 98.

Id. at 773, 251 N.W.2d at 152-53 (emphasis by the court). *See also,* RESTATEMENT (Second) OF CONTRACTS, §214(a) and (b) (1981). Judge Strom was clearly correct in

concluding that he would provisionally admit the oral testimony upon which Judds relied, so he could decide later whether Judds had established an oral contract enforceable under Nebraska law. Furthermore, Judds Brothers' counsel knew exactly what the court was doing and expressed his agreement with it.

3. Nothing prevented petitioner from introducing evidence to meet the parol evidence rule or the statute of frauds.

Although Judds Brothers argued in the Court of Appeals that it had introduced sufficient evidence of waiver, fraud, mutual mistake or other exceptions to prevent application of the parol evidence rule or the statute of frauds, it now contends it had inadequate opportunity to present such evidence because the trial judge overruled BNSF's objections to Judds' testimony of oral agreements. The judge's exchanges with Judds' counsel quoted above demonstrate, however, that the judge made it very clear that his rulings on the oral contract were provisional. He clearly explained his rulings to Judds Brothers' counsel, and suggested to him that he take care to address the concerns the judge had identified. (App. 230). In view of these discussions, Judds Brothers' claim that it was somehow misled into not introducing some evidence to except it from the parol evidence rule or the statute of frauds is weak indeed.

Moreover, if Judds Brothers had evidence it had not introduced that would have excepted its alleged oral contract from the parol evidence rule or the statute of frauds, it should have proffered the evidence in a motion

for new trial, rather than lamely asserting the existence of such evidence as grounds for a writ of certiorari.

4. The Eighth Circuit has thoroughly reviewed petitioner's constitutional and procedural arguments and found them to be without merit.

On page 5 of its petition, Judds Brothers states: "Thus, Judds' arguments regarding both the fundamental denial of its right to due process, as guaranteed by the Fifth Amendment and the unexplained departure from FRCP 8(c) and 16(e) have never been considered by any court." This statement is inexplicable, since immediately before this assertion, Judds quotes from this straightforward language of the Court of Appeals: ***"As for the appellant's constitutional challenge and any other argument not addressed by the District Court's Opinion, we have thoroughly examined the record and transcripts and find these issues to be without merit."*** (App. 3) (emphasis added).

Although Judds Brothers has stubbornly refused to read this plain English of the Opinion, it is obvious that the United States Court of Appeals for the Eighth Circuit has already carefully reviewed the constitutional and procedural arguments Judds is again making before this Court, and found them to be devoid of substance.

CONCLUSION

There is no compelling reason to grant a writ of certiorari in this matter, as the petition does not present an important federal question, and the courts below have not departed from the accepted and usual course of judicial proceedings. Accordingly, the petition for writ of certiorari should be denied.

Respectfully submitted,

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